to express our disapproval of tariff rules that are ambigious and misleading, and to a certain extent incapable of enforcement. Rule 4 of the Western Classification, quoted above, would be unobjectionable if it went no further than to absolve the carrier from liability for loss due to causes beyond its control. The carrier could not, however, escape responsibility for losses due to many of the causes catalogued therein if its negligence were the legal cause of the damage. The carrier must know, too, that the courts will not give full effect to stipulations that there shall be no liability for losses 'from any cause to property carried on open cars.' Again, the stipulation that 'shipments not made as above provided are subject to an additional charge of 20 per cent' is unreasonable. A certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited. An increased charge of 20 per cent is manifestly out of all proportion to the larger risk involved, and its virtual effect is to restrict the public to rates calling for limited liability. Herein lies the vice in stipulations of this character. It is a mischievous practice for carriers to publish in their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law. A revision in the interest of simplicity and fairness, eliminating such provisions as may be open to legal objection, would go a long way toward improving the relation of the railroads and the shipping public." E. C. G.

SURETY'S RIGHT TO EXONERATION.—If a surety pays the debt to the creditor he is entitled to all the rights which the creditor had the moment before payment. This right to the assignment of the claim against the principal and co-sureties and to the assignment of all the collateral securities for the payment of the debt is purely equitable; it is given to the surety because the creditor, having been paid can no longer enforce the securities and the debtor, not having paid can not have them surrendered up and cancelled. The rights which the surety gets by the assignment may, of course, be either legal or equitable and generally speaking he may bring whatever suit the creditor might have brought. This right of substitution, or subrogation does not arise until the creditor has been fully satisfied.

In addition to this right of subrogation by which the surety is enabled to stand in the creditor's shoes, the surety has also a direct right to sue the principal for reimbursement and the co-sureties for contribution. These rights were first given by equity but for over a century the surety has been allowed to sue at law; *Decker* v. *Pope,* 1 Selwyn, Nisi Prius 91; *Turner* v. *Davies,* 2 Esp. 479. The rights have become so well settled that they are frequently spoken of as being based upon a contract implied in fact at the time that the surety binds himself, but like the right of subrogation the better view is that these rights exist independently of contract. *Dempsey* v. *Bush,* 18 Ohio St. 376 (subrogation); *Hall* v. *Smith,* 5 How. 96, (reimbursement)—but see *Osborn* v. *Cunningham,* 4 Dev. & B. 423; *Deering* v. *Earl of*

Winchelsea, 2 Bos. & Pul. 270 (contribution). In order to entitle the surety to these rights it is not necessary that the creditor be fully satisfied; the right to reimbursement from the principal arises as soon as the surety pays any part of the debt and the Statute of Limitations as to that part begins to run at once against the surety. *Davies* v. *Humphreys,* 6 M. & W. 153. The right to contribution arises when it appears that the surety has paid more than his share and the Statute of Limitations as to such excess begins to run at that time. *Davies* v. *Humphreys,* ante.

These rights presuppose that the surety has already paid; what right does the surety have before paying? It has been sometimes said that the surety may compel the creditor to sue the principal first; *Harris* v. *Newell,* 42 Wis. 687; but there seem to be no decisions to that effect and there are many to the contrary. See *Meade* v. *Grigsby,* 26 Grat. 612, where the court said: "The creditor is under no obligation to look to the principal debtor or to his property or to exhaust his remedies against the latter before resorting to the surety." However, in those jurisdictions which by decision or statute have the rule of *Pain* v. *Packard,* 13 Johns. 174, a surety may escape liability if upon giving notice to the creditor to sue the principal debtor, the creditor does not comply.

Though the surety can not compel the creditor to sue the principal debtor, yet the surety may himself sue the principal and the co-sureties before paying anything. This right of exoneration, as it is called, is especially valuable to the surety where it would cause a financial sacrifice for him to raise the money by a forced sale of his own property. In such a case it is obvious that his rights of subrogation, indemnity and contribution are not adequate protection, since his measure of recovery will not be greater than the amount that he has paid. On the other hand, it is obvious that the enforcement of this right must not in any way hinder or embarrass the creditor; he may, notwithstanding the suit for exoneration by the surety, proceed to judgment and execution against him. *Roberts* v. *American Bonding Co.,* 83 Ill., App. 464. Hence the realization upon the right is dependent upon the inaction of the creditor against the surety. It is to be further observed that if the surety seeks exoneration against the co-surety he must be ready to pay his share.

Though this right has long been recognized, the cases are not numerous. Some points seem fairly clear. The right is purely equitable in its nature since it seeks a decree in personam; and exists independently of contract between the parties. It thus belongs to anyone who occupies substantially the position of surety. *Hayden* v. *Thrasher,* 18 Fla. 795. *Medsker* v. *Parker,* 70 Ind. 509. The right arises as soon as the debt matures; the surety need not wait till he is sued. *Merwin* v. *Austin,* 58 Conn. 22; *West* v. *Chasten,* 12 Fla. 315; *Lloyd* v. *Dimmack,* 7 Ch. D. 398, 401. But the right does not arise before maturity.

There is one important point which can hardly be said to be settled. Must the creditor be made a party to the suit? According to *Stephenson* v. *Taverners,* 9 Grat. 398, and *Moore* v. *Topliff,* 107 Ill. 241, he should be made a party in order that he may be at hand to receive the money and be bound by the decree. In most of the cases the point is not raised. Upon principle it

would seem that the principal would have the right to demand it in order to avoid any possible peril of having to pay twice. The creditor would not, of course, be liable for any costs. *Moore* v. *Topliff,* ante.

The recent case of *Fidelity and Deposit Co.* v. *Buckley* (1910), — N.H. —, 77 Atl. 402, did not raise the question because of the nature of the relief asked. In that case there was an express contract by which the principal agreed to mortgage sufficient real estate to indemnify the surety; the latter asks that the principal be decreed to execute the mortgage. The plaintiff having attached the defendant's real estate, the court refused the decree asked for on the ground that a decree ordering the defendant to pay the debt would be more direct, since it would bind the property so attached.

The right to exoneration has been placed on various grounds. Some cases seem to regard it as an extension of the right of subrogation based upon the fact that subrogation is not always an adequate remedy; see *Stephenson* v. *Taverners,* ante. Other cases seem to regard the bill as in the nature of a bill quia timet, *MacFie* v. *Kilauea Co.*, 6 Hawaiian 440; or as a bill for specific performance, *Street* v. *Chicago Wharfing Co.,* 157 Ill. 605. The remedy would seem to be satisfactorily explained on either of the first two grounds; and the third would be a satisfactory basis where there is an express contract. As was said in *Tankersley* v. *Anderson,* 4 Desaus 47: "It would be hard on sureties, if they were compelled to wait till judgment against them, or they paid the debt, before they could have recourse to their principal, who might waste his effects before their eyes." In *Wolmerhausen* v. *Gulick,* L. R. [1893], 2 Ch. 514, the court said: "if a man were surety with nine others for £10,000 it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties."

If the principal gives to the surety a bond or contract of indemnity, the surety is allowed to recover at law the full amount of the bond or contract though he has not paid the debt and has not been sued. *Loosemore* v. *Radford,* 9 M. & W. 657; *Lathrop* v. *Atwood,* 21 Conn 117. This doctrine has been criticised in SEDGWICK, DAMAGES, Ed. 8 § 790. Baron PARKER in *Loosemore* v. *Radford,* suggested that in such a case the defendant "may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt." Even if the principal debtor has such an equity, he still incurs the peril of the surety disregarding the equity and of thus being compelled to pay twice. G. L. C.

PROTECTION OF RIGHTS OF BONA FIDE PURCHASERS OF PERSONAL PROPERTY.— In view of the unmistakable trend of the law toward the protection of a bona fide purchaser of personal property, a trend that is being manifested particularly by the enactment by various state legislatures of recording acts the ultimate purpose of which is to protect the innocent purchaser, the recent decision of the Oregon Supreme Court in the case of *Johnson* v. *Iankovetz* (1910), — Ore. —, 110 Pac. 398 is noteworthy.

The action was instituted in that case to recover by replevin two guns